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## INTRODUCTION

### LAW'S QUANDARY: AN ECHO OF THE INFINITE, A GLIMPSE OF THE UNFATHOMABLE<sup>1</sup>

William Joseph Wagner<sup>+</sup>

Steven Smith's testimonial at the close of *Law's Quandary*<sup>2</sup> to "richer realities and greater powers" brings to mind, in its own way, Roberto Unger's profession of faith at the end of the book *Knowledge and Politics*.<sup>3</sup> There, Unger testified to his belief that human beings look "unceasingly for God" even at the limit of human capacity "where thinking must stop and action fail" and the quest for God transforms itself into that "final union of thought and love," whereby love becomes "thought disembodied from language and restored to its source."<sup>4</sup> Unger's final, direct invocation of God forms one of the more memorable utterances regarding God in recent American law:

But our days pass, and still we do not know you fully.

Why then do you remain silent? Speak, God.<sup>5</sup>

By his parallel closing declaration in *Law's Quandary*, Smith aspires to "render . . . [his readers] more receptive to" a deeper dimension of our universe "than our meager modern philosophies have dreamed of," e.g., the ". . . inner 'voice'" that Socrates "himself heard and took to be a 'divine or spiritual sign.'"<sup>6</sup> Justice Scalia, in his essay that follows below, reinforces, with a certain caustic reversal, the recollection which Smith's passage awakens of Unger's invocation, addressing Smith, and not God, in the vocative case in what surely is one of legal literature's more

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1. Oliver Wendell Holmes alludes to the dimension of law Steven Smith explores in *Law's Quandary* in his much quoted line: "The remoter and more general aspects of the law . . . which give it universal interest. . . . through them [] you . . . connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 478 (1897).

2. STEVEN D. SMITH, *LAW'S QUANDARY* 179 (2004).

3. ROBERTO MANGABEIRA UNGER, *KNOWLEDGE & POLITICS* (1975).

4. *Id.* at 295.

5. *Id.*

6. SMITH, *supra* note 2, at 178-79.

memorable mock entreaties. The Justice chides Professor Smith for not calling on God unambiguously as did Unger. Noting that Smith stops at "imaginings," that are "just-short-of-theological" and at not-so-cryptic references to "richer realities and greater powers in the universe,"<sup>7</sup> the Justice lets us know that he has had it with Smith, announcing himself "sorely tempted to leap up and cry out, 'Say it, man! Say it! Say the G-word! G-G-G-G-God!'"<sup>8</sup>

Justice Scalia discerns an all-too-"diligent" subservience to "academic correctness" beneath Smith's reticence.<sup>9</sup> In a well-known review of Unger's *Knowledge and Politics*, Arthur Allen Leff drew attention to the very ascendancy of the "political correct" irritating to Justice Scalia, observing that Unger, of "Langdell Hall," spent the "latter half" of the book "scratching . . . [his] clawing fingers as [he tried] to keep from being dragged to that final pass" of "nonironic divine address."<sup>10</sup> If the author of *Law's Quandary*, in a certain sense, similarly appears to truckle to contemporary convention against the public avowal of religion, appearances should not deceive. His acquiescence in the Academy's "ascetic" reluctance to acknowledge the possibility of God serves his own purpose and, in fact, is revelatory of an essential quality in his argument. Behind Smith's diffidence is an internal orientation to the basic mystery of existence that accounts for an extraordinary quality in *Law's Quandary*, leading Joseph Vining to declare the book "runs like a horse. . . . It runs and takes us with it."<sup>11</sup> The question we would do well to ask about *Law's Quandary* is not: why is it not written differently, but where does it so rapidly take us?

#### SMITH'S IMPORT IS MYSTAGOGICAL

The Unger invocation of God entails self-contradiction. Had Unger reached the "final union of thought and love" he extols, his thought, "disembodied from language," would have *ipso facto* given way to silence. Were the Almighty (or logic) to answer Unger, the "still small voice"<sup>12</sup> he might expect to hear in "the tangle" of his mind (to borrow

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7. Antonin Scalia, Review of Steven D. Smith's *Law's Quandary*, 55 CATH. U. L. REV. 687, 693-94 (2006).

8. *Id.* at 694.

9. *Id.*

10. Arthur Allen Leff, *Book Review: Knowledge and Politics*, 29 STAN. L. REV. 879 (1977).

11. Joseph Vining, *Law's Own Ontology: A Comment on Law's Quandary*, 55 CATH. U. L. REV. 695, 695 (2006)

12. The prophet Eliah heard God in a "still small voice." 1 Kings 19:12.

Patrick Brennan's term<sup>13</sup>), would most plausibly whisper: "Roberto, why are you still talking?" Smith's reticence contrasts with Unger's loquaciousness. As Joseph Vining states, Smith's book leaves us "at the *edge* of religious life looking forward."<sup>14</sup> Lloyd Weinreb notes that Smith seeks to fashion a "prolegomenon of a philosophy of natural law," but stops at the "brink of a philosophy of law transcending the limits of human reason."<sup>15</sup> Brennan notes that Smith "having sketched . . . [a] possibility . . . backs away from its . . . implications"<sup>16</sup> and only "teases with the possibility" of a theological grounding for a natural law theory.<sup>17</sup> Smith subscribes to, and is prepared to honor Unger's insistence that the human being's search for God in the end becomes "disembodied from language." Smith practices the stricture of silence before which Unger bows, and which he then oversteps.

In the terminology of theologian Karl Rahner, S.J., Smith's argument is "mystagogical."<sup>18</sup> It points the reader beyond itself to a level of insight transcending reason alone, at which, in Unger's words, "thinking must stop and action fail" and a "final union of thought and love" must lead thought to become "disembodied from language and restored to its source." This unifying purpose gives Smith's book its deeper power, that makes it, as Joseph Vining says, run "like a horse," "run[] and take[] us with it."

Smith shares an experience of law mediating an encounter with God. To use another of Rahner's concepts, Smith points the reader to a "limit" experience arising in law's domain.<sup>19</sup> To confront that "limit" is to find

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13. Patrick Brennan adopts the expression from a line given by playwright Robert Bolt to Sir Thomas More in *A Man for All Seasons* (1960) at 74. Patrick McKinley Brennan, *Law, Natural Law, and Human Intelligence: Living the Correlation*, 55 CATH. U. L. REV. 731 (2006).

14. Vining, *supra* note 11, at 699.

15. Lloyd L. Weinreb, *Law's Quest for Objectivity*, 55 CATH. U. L. REV. 711, 715-16 (2006).

16. Brennan, *supra* note 13, at 733.

17. *Id.* at 738.

18. The term mystagogy was used in the early Church as a term for initiation into the rites in which "divine power and grace are communicated" to human beings, as in the *Mystagogical Catecheses* attributed to St. Cyril of Jerusalem. *ENCYCLOPEDIA OF RELIGION* 2468 (1978). Karl Rahner adopts the term to "describe and focus the attention of each individual in his concrete existence on those experiences in which he in his individuality had the experience of transcendence and of being taken up out of himself into the ineffable mystery." KARL RAHNER, *FOUNDATIONS OF CHRISTIAN FAITH* 59 (1978). See generally JAMES J. BACIK, *APOLOGETICS AND THE ECLIPSE OF MYSTERY: MYSTAGOGY ACCORDING TO KARL RAHNER* (1980).

19. See KARL RAHNER, *Experience of Self and Experience of God*, in *THEOLOGICAL INVESTIGATIONS XIII* 122-32 (David Bourke trans., 1975) [hereinafter *Experience of Self and Experience of God*].

oneself in Smith's "quandary." One stumbles into it in connection with the void that exists in contemporary academic culture with respect to shared concepts that could help make sense of law as a normative and ontologically grounded reality. Smith holds that making sense of law in this way is required at the core of any truly dedicated lawyer's professional identity. Academic culture interprets this core identity as "nonsense."<sup>20</sup> The "ontological inventory" of the Academy, geared as it is to the assumptions of science, contains no "entries" validating it. The lawyer's experience of the law's ontological ground remains unabated, but concepts making sense of that experience are not at hand.

Rahner teaches that a sense of God may be most present to human beings precisely when they lack categories to account for what matters most.<sup>21</sup> As one turns the pages of *Law's Quandary*, the perception grows that, far from seeking to escape from his quandary, Smith embraces it, as a springboard to "richer realities and greater powers in the universe than our meager modern philosophies have dreamed of."<sup>22</sup> Smith delights in being—as Vining describes—"brought even against one's own resistance to the anteroom of what we now call 'belief' . . . 'a more confident sense of one's own substance and reality for which one thirsts.'"<sup>23</sup>

#### CONTRASTING ONTOLOGICAL INVENTORIES

The contemporary world as seen by Smith is a composite of clashing accounts of what is real. He calls for an "ontological audit"<sup>24</sup> of the differences among these accounts. He recommends drawing up "ontological inventories"<sup>25</sup> establishing the respective bounds of acceptable belief in each of several basic spheres of endeavor: science,

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The destruction of false idols, the act of attaining, or failing to attain, a state of transcendence over all reality definable in terms of particular categories and also reality as the necessary starting point for our knowledge of God, extending up to the Mystery which is beyond all our conceiving or achieving, man's surrender to himself, constant yet ever renewed, to the inconceivable God, or the refusal of such surrender in a lying self-sufficiency.

*Id.* at 131. Cf. KARL RAHNER, *The Experience of God Today*, in THEOLOGICAL INVESTIGATIONS XI 149-65 (David Bourke trans., 1974). "The moment we become aware of ourselves precisely as the limited being which in so many ways and such radical ways we are, we have already overstepped these boundaries . . . [to] the abiding mystery. This ultimate and original reality." *Id.* at 155-56.

20. "This disjunction between what we say we believe . . . and what our discourse and practice seem to presuppose provokes the suspicion that conventional law-talk is a form of nonsense." *LAW'S QUANDARY*, *supra* note 2, at 63.

21. *Experience of Self and Experience of God*, *supra* note 19, at 155-56.

22. SMITH, *supra* note 2, at 179.

23. Vining, *supra* note 11, at 695.

24. SMITH, *supra* note 2, at 17.

25. *Id.* at 17.

religion, and everyday experience.<sup>26</sup> He notes that these inventories may be express or implied and conscious or unconscious. The implicit and sometimes unconscious assumptions underlying legal practice form Smith's special object of interest.<sup>27</sup> He concurs with Vining when Vining says "what I *think* I believe is evidence—but *only* evidence—of what I *really* believe. . . . the ways in which I act and plan and live are also evidence of what I believe,"<sup>28</sup> with the result that he discerns the ontological assumptions of law not so much in what we formally acknowledge, as in our ways of talking and living. Tallying ontological assumptions across diverse spheres permits Smith to verify that different and inconsistent "ontological inventories" operate in different sectors.<sup>29</sup> Implicit metaphysical assumptions in law deviate from the ontological inventory of science. He does not concede that this discrepancy invalidates the assumptions of legal practice, considering it rather as no more than the demarcation of a boundary between the two vantage points.

In Smith's experience, legal practitioners find "sense" in considering themselves bound, in some metaphysical way, by the law's authority. He observes that they find sense "in the . . . marshaling, citing and distinguishing precedents" and in "the exposition and implementation of statutes and constitutional provisions."<sup>30</sup> At the heart of legal method, he suggests that faith exists that there is "sense" in the "elaborate practice of recording, collecting, arranging, reciting, and distinguishing past decisions" to justify present decisions.<sup>31</sup> Lawyers act as if the rule of the case is merely "evidence" of what "the law above or beyond" the rule is."<sup>32</sup> Smith infers from these features of legal reasoning the existence of an ontology that "overarches" legal practice. He words his conclusion in a manner, which Lloyd Weinreb, to foreshadow a note of dissent lying just ahead, for one, finds "odd."<sup>33</sup> Smith deduces that "'the law' *does* exist."<sup>34</sup>

Smith's separate "audit" of the legal academy brings to light a contrasting "anti-metaphysical bent" dating to Oliver Wendell Holmes,

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26. *Id.* at 22-37.

27. *Id.* at 39-64.

28. *Id.* at 171 (quoting JOSEPH VINING, FROM NEWTON'S SLEEP 3 (1995)).

29. *Id.* at 22.

30. *Id.* at 53.

31. *Id.* at 54.

32. *Id.*

33. Weinreb, *supra* note 15, at 711 ("[Professor Smith] acknowledges that the question is 'unusual,' 'uncouth,' and 'irksome.' It is all of those things. It is also distinctly odd.").

34. SMITH, *supra* note 2, at 156.

Jr. The academy's inventory of "the real" excludes the metaphysics of normative and ontological truth that the practice of law presupposes.<sup>35</sup> Smith cites the examples of Holmes' 1917 dismissal of a metaphysics of law as a "brooding omnipresence in the sky,"<sup>36</sup> and its reduction by Felix Cohen in 1935 to "transcendental nonsense."<sup>37</sup> Smith's history of a century of options in jurisprudence is muscular and it, in Vining's apt phrase, "runs and takes us with it." Its exhilarating quality flows from Smith's consequent exegesis of his own central compelling insight into the discrepant anti-metaphysical turn of academic commentary on law. Smith holds that just two ambits comprise the basic moves in jurisprudence since Holmes, one, the argument that linguistic and behavioral theory explain law without reference to any underlying "intrinsically" intelligible reality,<sup>38</sup> and the other, the claim that the law is reducible to some adjunct discipline that jurisprudence opts to align with it, i.e., economics, policy, or philosophy.<sup>39</sup> Smith asserts that both of these moves lead legal scholarship, and even judicial opinions, to disintegrate into meaningless words: the suspicion arises that "law-talk," whether emanating from scholars or courts, is "just words."<sup>40</sup>

### A THIRD ALTERNATIVE: THE REVIVAL OF METAPHYSICAL DISCOURSE ON LAW

The impasse of a legal practice premised on an ontology that academic opinion holds to be "nonsense" places Smith in his quandary. He seeks to transcend, rather than escape this impasse, by making of it an opportunity to rediscover God's presence at the limits of human understanding, and, in this very step, to fashion a platform for the academic revival of metaphysical discourse on law.<sup>41</sup>

Smith is emboldened to repudiate Felix Cohen's dismissal of an ontology of "the last long-drawn-out gasp of a dying tradition."<sup>42</sup> He points out that continuing reliance on such an ontology resembles a dying

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35. See SMITH, *supra* note 2, at 96. "Modern jurisprudential thought can plausibly be viewed as a series of efforts to squirm out of that commitment ['to the substantial existence of the Law'].<sup>35</sup> *Id.*

36. Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (cited in SMITH, *supra* note 2, at 48).

37. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (cited in SMITH, *supra* note 2, at 13).

38. SMITH, *supra* note 2, at 66-74.

39. *Id.* at 74-96.

40. *Id.* at 7.

41. Smith's book is "devoted" to showing that the "malaise of modern law and legal thought . . . is a manifestation of . . . a metaphysical predicament" which "will require us to 'take metaphysics seriously,' so to speak." *Id.* at 2.

42. *Id.* at 158 (quoting Cohen, *supra* note 37, at 833).

“gasps” about as much as a moving passenger train: the legal discourse that the academy holds to be “weird and exotic” persists.<sup>43</sup> Smith rejects, as logically flawed, Pierre Schlag’s aspersion of Sartrean bad faith on those who still so rely.<sup>44</sup> Smith rebuffs the idea that academic legal culture’s accepted “ontological inventory” bars an academic revival of a metaphysics of law. He is not convinced by the anti-metaphysical tradition in jurisprudence. He sees the first of its two ambits as “worse than nonsensical; it [is] brutally perverse. . . . [L]aw, in its consequences, is most emphatically *not* a self-contained language game: it is an enterprise with dire real-world effects.”<sup>45</sup> Echoing Owen Fiss, he declares that the second ambit misses the point of law in reducing it to terms properly belonging to other dimensions of experience.<sup>46</sup>

Hermeneutics provides Smith with his central insight for reviving metaphysical discourse on law. In his second iteration of this modifier, Lloyd Weinreb describes Smith’s insight, again, “odd.”<sup>47</sup> Besides flagging his own dissent, Weinreb, in so doing, calls our attention, in fact, to Smith’s mystagogy. Smith distinguishes meaning in law from other sorts of meaning. He defines legal meaning as “semantic,” i.e., he holds that it receives its content from the intent of an author.<sup>48</sup> Smith, moreover, asserts that the meaning of each and every element of law can be fully understood only as a tile in the mosaic of law *qua* law considered within the system of law as a whole. Smith, thus, postulates a necessary overarching intentionality behind the system of law. The answer conforming to this intentionality is a “right answer” to any legal question.

Smith’s account is a mirror opposite of Dworkin’s famous theory of legal hermeneutics. Dworkin asserts that the interpretive vantage of the hypothetical ideal judge, “Hercules,” makes possible a unified tapestry of law as systemic whole. By definition, Hercules’ answer to any given legal question is the best (most coherent) answer humanly possible in an evolving situation given changing circumstances.<sup>49</sup> Smith, for his part,

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43. *Id.* at 54 (quoting CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 14 (1996)). Smith observes “[t]he ways in which lawyers and judges (and even most legal scholars) actually practice and talk about law are not so different than they were a century ago—or even five centuries ago.” *Id.* at 1.

44. *Id.* at 161-62 (quoting Pierre Schlag, *Law as the Construction of God by Other Means*, 85 CAL. L. REV. 427 (1997)).

45. SMITH, *supra* note 2, at 74.

46. Fiss rejects both critical legal studies and law and economics because he says “both start from a rejection of law as an embodiment of a public morality and thus have a common base line.” Owen M. Fiss, *The Death of Law?* 72 CORNELL L. REV. 1, 14 (1986).

47. Weinreb, *supra* note 15, at 712.

48. SMITH, *supra* note 2, at 125 (“In sum, legal meaning depends on the (semantic) intentions of an author.”).

49. See RONALD DWORKIN, *LAW’S EMPIRE* 400 (1986).



envisions no such authorized interpreter, but a *real* author who “intends” the legal system *a priori*, as it would appear, if carried out in all detail, to the point of ultimate coherence.<sup>50</sup> For Smith, each correctly decided opinion and validly enacted statute implies the existence of such an authorial being, so that the lawyer’s dawning conviction that “*Law Exists!*” becomes an exercise in mystagogy analogous, in its own way, to St. Anselm’s ontological proof of God’s existence.<sup>51</sup> The meaning of laws, within a system of law, entails the actual existence of a real omniscient author,<sup>52</sup> not merely of such author *ex hypothesi*, as Justice Scalia suggests.<sup>53</sup> Faced with law, Smith ultimately is saying that the human mind grasps that such an author exists, and that author is *God*.

### DISSENT AMONG THE GATHERED

“Riders” as they all are on his horse, Smith’s respondents, whose essays follow below, each, sooner or later, appears to find himself—to extend Vining’s metaphor—astride a runaway steed cantering past divers pastures and paddocks to which the rider may wish to turn, toward an emerald-green meadow of its own desire. Each, in turn, declines to adopt even one of the basic propositions of Smith’s argument. In the end, each, for reasons respectively his own, refuses to avow the marriage Smith avows between religion and law.

Smith’s argument comprises three basic propositions: 1) every element of law takes on its meaning in relation to the mosaic of all law, such that law, *qua* law, possesses definitive systematic meaning, in turn, reflecting

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The actual, present law, for Hercules, consists in the principles that provide the best justification available for the doctrines and devices of law as a whole. His god is the adjudicative principle of integrity, which commands him to see, so far as possible, the law as a coherent and structured whole. There seems no room in this picture for the idea of law made more coherent, purer, than it actually is. If it is possible to make the system more coherent, then this more coherent system is the actual, present law, so once Hercules has worked out what the law now is, there can be no purer law latent within it. Law as integrity (we might say) *is* the idea of law worked pure.

*Id.*

50. See SMITH, *supra* note 2, at 47 (illustrating “God as a sort of transcendent Legislator and the hidden source even of human law”).

51. Smith suggests that the hypothetical adequate author of all law implies a real one, “‘the law’ . . . exists before, and thus independent of, the decisions that merely declare what is already in existence.” *Id.* at 62. St. Anselm’s argument is that if God is a being than which nothing greater can be conceived, than a God who is real is greater than one who is not, so that God is real. See KARL BARTH, *ANSELM: FIDES QUAEERENS INTELLECTUM* 101 (Ian W. Robertson trans., John Knox Press 1960) (1958).

52. SMITH, *supra* note 2, at 152 (“Law’s ultimate author was God.”), *id.* at 173 (“the transcendent author”).

53. Scalia, *supra* note 7, at 694.

an overarching ontology; 2) this ontology arises with the intention of some real subject as the source of the law's total meaning; and 3) this subject "behind" the law is God Himself. Capturing the objections of Smith's respondents' to these three assertions places the option Smith actually proposes in clearer silhouette.

#### A DEFINITIVE MEANING AND OVERARCHING ONTOLOGY FOR POSITIVE LAW?

To reach his conclusion that law *qua* law possesses a definitive meaning and overarching ontology, Smith begins from patterns of formal logic in the law's derivation of its conclusions from its premises. Interestingly enough, this starting point establishes a kinship between Smith's position and one of the anti-metaphysical ambits in recent jurisprudence he rejects on its face. Positivism relies on linguistic convention to explain the law's purported function without reference to sources of meaning outside law itself. Smith merely transfers the basis of the law's formal coherence from linguistic convention to a posited transcendent source of "intention." His stance can, thus, fairly be described as transcendental positivism.

Smith's interlocutors each decline this premise. Justice Scalia asserts that Smith is drawn into positing a transcendent basis for law's coherence by clinging to an outmoded and unsustainable "common-law-*sans*-brooding-omnipresence" idea of law. Scalia reminds his reader that a widespread derogation of common law has overtaken American law, at the federal level, through *Erie v. Tomkins*' repudiation of federal common law, and, at the level of state legislatures, through a flurry of statutory enactments over the past century<sup>54</sup> in a process Guido Calabresi elsewhere dubs "the statutorification of the common law."<sup>55</sup> Justice Scalia charges that Smith fails to appreciate legislative enactment as the primary source of law, asserting that the will of the legislature suffices to ground the force of positive law. In Scalia's view, Smith is premature in reaching for his transcendental anchor.

Lloyd Weinreb critiques Smith's premise from an opposing angle. Weinreb's concern is with Smith's lack of proper appreciation for the judicial, rather than legislative function. Where Smith's intent is in the determinate legal requirements that validate judicial holdings and legislative enactments, Weinreb asks, rather, how any particular outcome can be said to be necessary, under a particular rule, on the facts of a concrete case. Weinreb asserts that no objective warrant can be offered for this step in judicial reasoning, which he considers an original and

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54. Scalia, *supra* note 7, at 689.

55. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

unbounded judgment that the new factual context is analogous to ones already acknowledged as coming under the rule. Weinreb disagrees with Smith that only one among the multiple possible answers "fits" rule to fact and is, thus, the "right answer" advancing the law's basic purpose<sup>56</sup> of "accommodating the diverse needs and interests of people" attempting to "live together in community."<sup>57</sup>

Vining, whom Smith much admires, also declines to adopt Smith's account of legal meaning. Where Scalia and Weinreb interest themselves in distinguishing their views from Smith's on the question of the interpretation of formal patterns of legal reasoning, Vining focuses the role, which he suggests that Smith overlooks, of substantive personal values and meanings in the formation of legal meaning. His catalogue of such elements includes: the personal character of linguistic expression; the possibility of authentic and inauthentic use linguistics; "the rationality of means and ends"; "a sense of time"; "the presence of persons" within individual life spans and common spans of time; a readiness to credit the existence of "supra-individual persons"; and the social quality of human experience, the paradox of which is that "we are more than one," but "when we speak" we can only speak as one.<sup>58</sup> Vining finds the law's coherence not, primarily, in its textual or other formal conventions, but in these substantive personal values and meanings, which, in the end, he presents as aspects of cohesive interpersonal bonds arising through a common regard for law: "the question of what the law 'is' is not so very different from the question of what we 'are.'"<sup>59</sup>

While Vining rejects the instrumentalism associated with legal positivism, it is Patrick Brennan who restates this theme in the vocabulary of a thomistic philosophy of practical reasonableness.<sup>60</sup> The value of legal reasoning, in Brennan's view, lies in its usefulness in the formation of community and in the self-constitution of self-legislating moral agents. For Brennan, the one meaning of the law's many-layered meanings that ultimately matters "for better or worse" is that on which "we are given to live."<sup>61</sup> Thus Brennan's leitmotif, the advice Robert Bolt

56. Weinreb, *supra* note 15, at 716.

57. *Id.* at 728.

58. Vining, *supra* note 11, at 704-06.

59. SMITH, *supra* note 2, at 173 (quoting JOSEPH VINING, FROM NEWTON'S SLEEP 128 (1995)).

60. See Brennan, *supra* note 13, at 744 ("We must use our created intelligence to discover the natural law and the means of its implementation.").

61. *Id.* at 741.

attributes to Sir Thomas More: "We are created 'to serve [God] wittily, in the tangle of [our] mind[s].'"<sup>62</sup>

In sum, Smith's interlocutors resist adopting his faith that law *qua* law (positive law) forms a system of right answers implying an overarching ontology. They generally look, instead, beyond positive law itself to some more fundamental human ideal to fix the basis of the positive law's meaning, e.g., the idea of fairness, the postulates of practical reason, or the form of human community. In short, none of Smith's interlocutors shows any inclination to adopt Smith's stance of transcendental positivism.

#### A REAL AUTHOR'S INTENTION AS GROUND OF LEGAL MEANING?

Smith's interlocutors also each disagree, in one way or another, with his claim that the meaning of any particular law or system of law is properly the semantic one its author "intends." The pathway of communication Smith envisions between the authority promulgating the law and the law's subjects is essentially "one-way." The law's meaning, for the one subject to it, is in his view that which an author once intended. Patrick Brennan voices the clearest support for this "semantic" definition of law,<sup>63</sup> but even he rejects the unilateral direction Smith accords to the "sending and receiving" of legal meaning. Brennan observes that:

[texts] are the intelligible and intelligent communications of other persons engaged in the collective construction of the good. We look to the texts in law as the communication of intelligence about living, because intelligence (as a capacity) is what we have, and intelligence (as the product of the successful use of that capacity) is what we are after.<sup>64</sup>

For Brennan, the intentions of promulgator and interpreter of legal text unite, not in the interpreter's reception of the promulgator's abstracted intention somehow encoded in the text, but rather in their common purpose of living intelligently.<sup>65</sup> Brennan understands interpretation not as a matter simply of finding the "right answer" as the lawmaker intended it, but, rather, as a highly complex historical study of the meaning of the lawmaker's prescriptions considered as proposals for living intelligently, and, reciprocally, a study of what this received

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62. *Id.* at 731.

63. *Id.* at 752.

64. *Id.*

65. *Id.*

intention must mean in the present to the interpreter who is devoted to the same purpose.<sup>66</sup>

Joseph Vining further blurs the difference between the perspectives of subject and lawmaker, declaring both perspectives to be merely partial: “we are more than one, and, when one of us speaks, about anything, he or she is only one.”<sup>67</sup> According to Vining’s epistemology, knowledge arises only with the active participation of those receiving it. In his view, to interpret a legal text is to construct, not just its meaning, but, to some degree, even “the identity” of the one originally intending it.<sup>68</sup>

Justice Scalia resolves the interpersonal problem of legal meaning yet differently, observing that law does not entail the direct communication of intention from the mind of the lawmaker to that of subject, but rather occurs indirectly through the conventional meanings attached to words. He holds that what “is needed for a symbol to convey meaning is not an intelligent author, but a conventional understanding on the part of the readers or hearers that certain signs or certain sounds represent certain concepts.”<sup>69</sup>

Lloyd Weinreb trumps all these views, asserting that no objective norm governs how a legal rule should be applied in a novel situation. Neither clarity about authorial intention, nor the “plain meaning” of words spares the judge from an original judgment on how a rule applies in context. Weinreb considers the “leap of faith” Smith recommends to belief in overarching authorial intention and ontology unwarranted. He concludes that an indeterminacy in the law’s meaning cannot be overcome, and, for that matter, poses no problem.<sup>70</sup> Subjectivity of result does not, in any way, offend him. He traces Smith’s need, by contrast, for “objective normative answers” to a “Kantian turn” dominating moral philosophy for two centuries, that he charges with launching an impossible quest to validate normative reasoning “down to (or up from) the ground.”<sup>71</sup> The only “leap” Weinreb counsels would appear to be that of dismounting at once, with care to avoid a spill, from Smith’s horse.

In response to Smith’s second proposition, then, of Smith’s four interlocutors, one denies that the meaning of law lies in “intent,” asserting instead that it is found in words. Another denies that the law can communicate a determinate norm for applying law to fact. The two remaining trace the meaning of law to intent, but conclude that the law is

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66. *Id.* at 751.

67. Vining, *supra* note 11, at 704.

68. *Id.* at 708.

69. Scalia, *supra* note 7, at 692.

70. Weinreb, *supra* note 15, at 726-27.

71. *Id.* at 729.

more of a collaborative conversation than one-sided dictation by its promulgator. In sum, Smith's interlocutors jointly reject his claim that the law's meaning arises with an author's unilateral communication of an intention.

#### GOD AS THE SOURCE OF THE INTENTION BEHIND THE LAW?

Smith's final step is to locate the intentionality he says grounds the law's meaning in a transcendent source, implying that that source is God. Two of Smith's symposium respondents simply deny the relevance of this final assertion, while two others, like Smith, take a leap of faith in a divine ground to law, but land elsewhere than on Smith's particular ledge. Of the first pair, Lloyd Weinreb denies that there is any problem for an invocation of God to resolve for he contests the role Smith assigns in law to overarching intention.<sup>72</sup> And, Justice Scalia, likewise, finds the appeal to God unnecessary. In his view, the consent of the governed alone serves adequately to ground the law's authority. The intention of legislators, as the people's representatives, give the law its meaning, leaving textualist judges to infer that intention from the words they leave behind. Justice Scalia states: "[t]extualists, being content with a 'modest' judicial role, do not have to call in the Almighty."<sup>73</sup>

Patrick Brennan and Joseph Vining join Smith in "a leap of faith" to a substantive ontology, but come down differently than he does. While acknowledging that religion can or does complete their jurisprudential schemes, each declines to endorse Smith's union of religion and law. Vining admits that they law has "affinities with or sisterly resemblances to the practices, language, and self-reflections of religious life."<sup>74</sup> Brennan, following Aquinas, and before Aquinas Augustine, goes farther, granting that "[I]n temporal law there is nothing just and lawful, but what man has drawn from the eternal law."<sup>75</sup> Neither Vining nor Brennan, however, go so far as to consider law the product of human, rather than divine intention.

In place of any overarching "semantic" intention on God's part, Vining urges that the object of the "law's faith" is that "there is a 'We.'"<sup>76</sup> He recognizes that Smith brings us, at the brink, to the *terminus ad quem* of theism, but recommends that "instead of being left at the edge of

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72. Weinreb, *supra* note 15, at 728 ("Whether there is a transcendent reality or power of the kind that Professor Smith contemplates is a matter about which I have nothing to say.").

73. Scalia, *supra* note 7, at 694.

74. Vining, *supra* note 11, at 700.

75. Brennan, *supra* note 13, at 741 (quoting ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, at I-II Q. 93, art. 3).

76. Vining, *supra* note 11, at 710.

religious life looking forward," we "look back" into "ordinary life."<sup>77</sup> Vining judges that law's place is within the "family dynasty" Smith designates as "mundane," rather than "religious."<sup>78</sup> Vining traces the authority of law to "the human mind that cares" for the "we." In his view, this mind cannot be one with the characteristics of the Divine Mind, i.e., "that comprehends the universe."<sup>79</sup> Vining also holds it necessary that the "inclusive we" of jurisprudence embrace persons who are "without or before an ultimate commitment to the Divine."<sup>80</sup> Cited by Smith with approval as "associated with religion," John Finnis essentially concurs on this latter point.<sup>81</sup>

With St. Thomas Aquinas, Patrick Brennan presupposes, that "[I]n temporal law there is nothing just and lawful, but what man has drawn from the eternal law."<sup>82</sup> But Brennan equates being subject to "eternal law" with the simple demand that a rational being like the human person be "provident both for itself and for others." He considers natural law to "order the person toward his or her proper goods and toward the common good; as beings created with reason and freedom," and holds that we are obligated "by the divine plan to implement (or not) God's law for us."<sup>83</sup> Brennan regards Smith's failure to affirm the self-legislating character of classical natural law reasoning as a decisive flaw in Smith's project of restoring the law to a reliable metaphysical anchor.<sup>84</sup>

Smith's interlocutors agree among themselves that God's overarching intention does not, in any unmediated way, provide an ontology of law, but they go further, forming, in fact, a counter-consensus. Lloyd Weinreb expresses this consensus best when he concludes that the authority of law arises where "free and responsible" persons seek to accommodate, under a common rule, "the diverse needs and interests of people" attempting "to live together in a community."<sup>85</sup> Justice Scalia fits the consensus, with the proviso only that the social contract giving rise to a political community yields formal and procedural limits on

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77. Vining, *supra* note 11, at 699.

78. *Id.*

79. *Id.* at 704.

80. *Id.* at 700.

81. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). Finnis derives the law's distinctive intelligibility in relation to the requirements of practical reasonableness. *Id.* at 276-77. He believes that an added reason for being responsive to law can but need not be found in the postulate of God. *Id.* at 406. He does believe that religion is a basic good among others which the law will advance, but he defines religion very broadly to include Sartre's "*point de départ* that God does not exist." *Id.* at 90.

82. Brennan, *supra* note 13, at 741.

83. *Id.* at 742.

84. *Id.* at 741.

85. Weinreb, *supra* note 15, at 728.

governmental power.<sup>86</sup> Joseph Vining and Patrick Brennan, part of this same consensus, simply go beyond Weinreb to identify normative markers in human ontology<sup>87</sup> suggestive of a further normative jurisprudence to which Weinreb would not subscribe. The theistic reference centrally important to Smith remains for Vining and Brennan, indirectly relevant, an interpretive “layer” (Brennan’s term<sup>88</sup>) in jurisprudence.

An “audit” of the ontological inventories of each of Steven Smith’s symposium respondents suggests, then, that this symposium on *Law’s Quandary* uncovers a consensus among several well regarded thinkers on at least one general direction for credibly updating the tradition of jurisprudence Smith refers to as “neoclassical.” Smith deserves credit for the quality of this consensus, which crystallizes as response to his cogent framing of the issue. The more fascinating discovery as one compares symposium viewpoints and the one calling for the more careful analysis, however, is that, even as Smith occasions the consensus in question and remains poised with friendly interest at its edge, the train of his thought—or the “horse on which he rides,” to return again to Vining’s metaphor—sets out in a direction apart. The more significant gain from the consensus among Smith’s respondents is the sharper profile it provides of Smith’s own counter position.

#### SMITH’S THEOCENTRIC JURISPRUDENCE

Smith’s prolegomenon to a “metaphysics of law” is theological. In this respect, his angle of vision diverges from those of his symposium interlocutors whose methodologies are philosophical. Smith does not refer to God as philosophical explanation, but to express a concern to understand a divine self-disclosure he perceives in human law. Smith depicts God as the “author” of the total meaning of our laws, i.e., by analogy to Trollope or Blackstone, as “like” the human author. God, then, possesses an authorial “I” or, in Vining’s terms, a “voice,”<sup>89</sup> and He communicates intelligible meanings, “as if” to legal technicians who wait to apply his Word. God makes His Mind known through our law. Thus

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86. See Scalia, *supra* note 7, at 687 (“But in a democracy, it is not the function of law to establish any more social policy than what is fairly expressed by legislation, enacted through prescribed democratic procedures.”).

87. Vining cites “fundamental values that animate initiative and by which responsibility is measured,” Vining, *supra* note 11, at 701; Brennan describes law as a “principled tool in the project of realizing the human good,” Brennan, *supra* note 13, at 736, and observes that the good is known through “inclinations that rise up into the intellect,” *id.* at 744.

88. Brennan, *supra* note 13, at 741.

89. Vining, *supra* note 11, at 695.



known, the Divine Mind impresses us as "large," as more capacious even than the composite of the minds of the members of both Houses of Congress and all Supreme Court justices in the history of the United States. Smith conceives of God's mind as encompassing the totality of every jot and tittle, legal nuance, outlying case, and fundamental constitutional norm of our system of law, considered against the backdrop of every conceivable set of facts in every American time and place: past, present, and future.<sup>90</sup> If we are paying attention, however, this Divine Mind is only relatively big. It does not, for example, contain myriad other details found, by contrast, in the Mind of St. Thomas Aquinas' God, for Whom the instinctual strategies of the sea snail and the wombat, the molecular structure of rock crystals, sun spots and a great many other things besides, including the fundamental human capacity to know and to love, also express His Eternal Law.<sup>91</sup>

Smith's more particular image of God derives its plausibility from the residual cultural currency of the Protestant picture of God as the author of Holy Writ, since, in Smith's view, the interpretation of law equals "the search for the meaning of a legal text."<sup>92</sup> Smith cites St. Thomas and seeks dialogue with Catholic thinkers, but his image of God, nonetheless, resonates much more with Reformation views. As with his Protestant precursors, Smith's concept of God draws its intelligibility from the text of scripture and from what the text commands, not by any bridges to concepts of reason, nature or history as these appear, for example, in the synthesis of Aquinas Patrick Brennan unpacks.<sup>93</sup>

All theology, including Protestant theology, grafts concepts of God and of God's import for law, no less than does philosophy, into some more comprehensive view of the human situation. Spatial and temporal metaphors can serve to capture succinctly the relation of God a given

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90. Smith sees "what 'the law' *is*" as possessing "an ominously expansive sense in which 'is' describes a sort of perpetual present reaching back into the indefinite past." SMITH, *supra* note 2, at 61. Being in a position to know the totality of the intention giving law its comprehensive meaning, respecting the coordination of conduct, the establishment of policy and the resolution of disputes, *id.* at 127, is, in his words, "a very demanding job," *id.* at 150.

91. ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* at I-II Q. 93, art. 5 and Q. 94, art. 2 (Thomas Gilby, O.P. ed. & trans., Blackfriars 1966). In this fashion even non-rational creatures are subject to it through being moved by divine Providence, though they are not like rational creatures" *Id.* at I-II Q. 93, art. 5. All "animals" and even all "substances" possess an intrinsic inclination according to their natures attributable to Eternal law, in St. Thomas' vision. *Id.* at I-II Q. 94, art. 2.

92. SMITH, *supra* note 2, at 98

93. Law necessarily intersects with every other vector of human meaning in this view as, in the words of Brennan, "[t]he natural law is never fully known, therefore never fully implemented; it remains Flannery O'Connor's good 'under construction' in each individual and in every society." Brennan, *supra* note 13, at 755.

theology supposes God to have to other dimensions of human experience within a more comprehensive view of reality. God may be found from “below,” as sustaining Uncreated Cause; from “above,” as the source of grace; from the “past” at the fountainhead of our origin; or from the eschatological “future”, which is very long-term but which may, in fact, turn out to be right now. The God Steven Smith limns does not, however, have a discernible connection with such an “above,” “below,” “past,” or “future.” This absence, in a depiction of God, of specific coordinates within a larger temporal or spatial metaphor, betrays the influence of sixteenth-century French Reformer, Jean Calvin.<sup>94</sup>

For Calvin, human reason, caught between human depravity after the Fall and God’s sovereign freedom in making His subsequent offer of salvation, is virtually hopeless as a source of moral knowledge. Calvinism’s disapprobation of the moral failures of the medieval Church led him to conclude that the Fall had occasioned depraved human intellect’s loss of its capacity, in its now irreparable venality (in Luther’s words, “reason is a whore”),<sup>95</sup> reliably to know or apply such concepts as person and community, nature and grace, or faith and reason. It also led him to conclude that human beings now lack the unaided capacity to choose the good. God’s bestowal of salvation, in this view, occurs through God’s sovereign condescension and, thus, is in complete discontinuity with whatever might, otherwise, appear sound in human choice and action.<sup>96</sup>

Reviving St. Augustine and anticipating Thomas Hobbes, Luther holds that, even under the circumstances of the Fall, God, nonetheless, wills the preservation of those conditions in human society representing a temporal truce from violence.<sup>97</sup> Calvin, in a certain contrast, adopts a

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94. In Calvin’s theology, “God is utterly free.” HANS J. HILLERBRAND, *THE WORLD OF THE REFORMATION* 74 (J.M. Dent & Sons Ltd. eds. 1973). On Calvin’s significance for the Reformation generally, see *id.* at 71-81.

95. See LUTHER, *The Last Sermon in Wittenberg, 1546*, in 51 LUTHER’S WORKS 347 (Jaroslav Pelikan & Helmut Lehmann eds., John W. Doberstein trans., 1959). “But the devil’s bride, reason, the lovely whore, comes in and wants to be wise, and what she says, she thinks, is the Holy Spirit. Who can be of any help then? Neither the jurist, physician, nor king, nor emperor; for [reason] is the foremost whore the devil has.” *Id.*

96. JEAN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 764-65 (John T. McNeill ed., Ford Lewis Battles trans., Westminster Press 1960) [hereinafter CALVIN’S INSTITUTES].

97. MARTIN LUTHER: *SELECTIONS FROM HIS WRITINGS* 371 (John Dillenberger, ed., 1961).

[T]he wicked always outnumber the good. Hence a man who would venture to govern an entire country or the world with the Gospel would be like a shepherd who should place in one fold wolves, lions, eagles, and sheep together and let them freely mingle with one another and say, Help yourselves, and be good and peaceful among yourselves . . . The sheep, forsooth, would keep the peace and

concept of responsibility for the world under an ethic of Divine Command. His ethic is heteronomous. The believer can earn no merit by choosing well,<sup>98</sup> but is, in faith, still to conform to a "Divine Indicative" that self and world are to be restored.<sup>99</sup> Calvinist theologians conflated *lex* and *logos*, skipping the intermediate step of natural law reasoning seen in medieval figures like St. Thomas Aquinas.<sup>100</sup> They held that the law of Moses, i.e., the Pentateuch with its Decalogue, obligated Christians. So thoroughly did they collapse ethics and law, that, at the height of their fanaticism, they enacted Mosaic Law, as positive civil law, in both Geneva and Scotland.<sup>101</sup>

This Calvinist elision of Law and Gospel parallels an older tradition within Judaism also divinizing positive law. Hellenistic influence led some Jewish writers to depict the prescriptions of the Torah as eternally pre-existent.<sup>102</sup> Hellenized Jewish thinker, Philo of Alexandria, for example, correspondingly taught "that the best form of government is that based upon fixed law, not indeed upon man made fixed law, but upon a divinely revealed fixed law."<sup>103</sup> In Philo's view, "[i]n a state governed by such a divinely revealed law, every individual has his primary allegiance to God and to the law revealed by God."<sup>104</sup> While Smith seeks to distance himself from the notion that, by approving, in some sense, of St. Thomas Aquinas on Eternal Law, he means to suggest

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would allow themselves to be fed and governed in peace, but they would not live long . . . .

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For this reason these kingdoms must be sharply distinguished, and both be permitted to remain; the one to produce piety, the other to bring about external peace and prevent evil deeds . . . .

98. See CALVIN'S INSTITUTES, *supra* note 96, at 764-75. "To sum up, man cannot without sacrilege claim for himself even a crumb of righteousness, for just so much is plucked and taken away from the glory of God's righteousness." *Id.*

99. See *id.* at 790. "Yet those good works which he has bestowed upon us the Lord calls 'ours,' and testifies they not only are acceptable to him but also will have their reward. It is our duty in return to be aroused by so great a promise, to take courage not to weary in well-doing, and to receive God's great kindness with true gratefulness." *Id.* (citation omitted). For the concept of the "Divine Indicative," see EMIL BRUNNER, THE DIVINE IMPERATIVE (1947).

100. St. Thomas inserts the step of practical reasoning, AQUINAS, *supra* note 91, at I-II Q. 91, art. 2, between that of Eternal Law, *id.* at I-II Q. 91, art. 1, and human and divine law, at I-II Q. 91 art. 3 and 4.

101. GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 143 (1960).

102. THE ENCYCLOPEDIA OF JUDAISM 710 (1989) ("Many rabbinic teachings speak of the Torah as existing in Heaven prior to the creation of the world. . . . According to [one] . . . Midrash the Torah served as the blueprints of the universe which God consulted as He created the world.") (citation omitted).

103. 6 THE ENCYCLOPEDIA OF PHILOSOPHY 151, 154 (Paul Edwards ed. 1972).

104. *Id.*

that there is “a sort of ghostly Internal Revenue Code in all of its magnificent detail written in the heavens, and that the Code we find in our more terrestrial tax volumes is merely a mundane photocopy of the celestial original,”<sup>105</sup> Smith’s own assertion that there is, in the case of retroactive law, a law “already there” that judges and lawyers discover,<sup>106</sup> nonetheless, resembles, in fact, nothing so much as Philo Judaeus’ “divinely revealed fixed law.”

Smith exhibits a reverence for the professional calling of lawyers that can, likewise, be tracked, at least indirectly, to Calvin. Calvin, no less than Luther, teaches the imputation of righteousness to the Christian believer through faith.<sup>107</sup> Both Reformers call upon the believer to live out this Christian righteousness in a vocation in the world. This ideal reverberates in Smith’s charge to attorneys to be responsible custodians of meanings “hidden” behind texts.<sup>108</sup> Smith advances a concept of law as a learned profession. His view of lawyers is remarkably like that of H.L.A. Hart in *The Concept of Law*.<sup>109</sup> Hart describes lawyers as a caste of legal functionaries who cultivates the law’s “internal point of view.”<sup>110</sup> Smith’s lawyers, like Hart’s, adopt an insider’s understanding of the law: one could say, in both cases, of the law behind the law. Both authors depict lawyers as priests of the law. There are moments when one might think Smith the author of Holmes’ oft repeated verse: “[L]aw . . . [is] . . . but a well known profession.”<sup>111</sup> Unlike Holmes’ and Hart’s concepts of law as profession, Smith’s notion of law as vocation possesses a theological inspiration that still resonates with Calvinism.

Like contemporary reform-tradition theologian, James Gustafson,<sup>112</sup> or twentieth-century Calvinist giant, Karl Barth,<sup>113</sup> Steven Smith, as evidenced in *Law’s Quandary*, might in principle opt to proceed to a fully theocentric jurisprudence. If Smith were, without more, to undertake

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105. SMITH, *supra* note 2, at 47.

106. *Id.* at 61.

107. CALVIN’S INSTITUTES, *supra* note 96, at 764-65.

108. See SMITH, *supra* note 2, at 45 (“There are . . . the lawyers, judges, and clerks; the courtrooms, chambers, and offices; the legal briefs and oral arguments. When we talk about the law, we may be referring to these sorts of things . . . to Holmes’s ‘well known profession.’ There there is . . . that independent, more ethereal . . . entity . . . ‘the law.’”).

109. H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

110. *Id.* at 100-17.

111. Holmes, *supra* note 1, at 457.

112. See generally JAMES GUSTAFSON, *ETHICS FROM A THEOCENTRIC PERSPECTIVE* 87-113 (1981).

113. See generally KARL BARTH, *CHURCH DOGMATICS, THE DOCTRINE OF CREATION*, pt. 4 (G.W. Bromiley & T.F. Torrance eds., T. & T. Clark 1961); KARL BARTH, *THE EPISTLE TO THE ROMANS* 77 (Edwyn C. Hoskyns trans., 6th ed. 1968) [hereinafter BARTH, *EPISTLE*].

such a project, two unresolved contradictions would, however, rise up to obstruct his path. The thomistic thought on law, with which he dallies, is logically incompatible with his own expressed theological commitments. On the other hand, two key Reformation ideas, those of divine transcendence and human sin, are conspicuously missing from his present sketch. Without them ideas as anchors, Smith's synthesis promises to transform itself into something other than the theocentrism of James Gustafson, Karl Barth, or John Calvin that, at one level at least appears as its leitmotif.

#### SMITH'S THEOCENTRICISM AND THE THOUGHT OF ST. THOMAS AQUINAS

While Steven Smith calls for broadening the too "ascetic"<sup>114</sup> "ontological inventory" of academic discourse on law, he stops short of recommending the fullscale integration of the ontological inventories of the Christian religion, or of the popular culture of medieval and early modern Europe. In his view, these latter worldviews are too "lush"<sup>115</sup> or "promiscuous,"<sup>116</sup> "(filled [as they are] with divinities and magical beings, perhaps) that can be invoked to account for almost everything, but precisely for that reason cannot really explain almost anything (why *this* and not *that*?)"<sup>117</sup> Smith advocates the adoption of an Aristotelian mean ensuring that only enough, and not too much, is added to the ontological inventory of law, so that it explains and does not obfuscate the "this and not that" of the ontological and metaphysical experience of law.<sup>118</sup>

Smith cites St. Thomas Aquinas's classical account of law as a candidate for inclusion in a revived inventory for jurisprudence. Smith says that Aquinas' theory, "if it were admissible and believable, *might* be of some help."<sup>119</sup> Smith seems to imply that at least this account may satisfy the mean he proposes. To test the addition of St. Thomas's thought to Smith's proposed revised inventory for whether it would precipitate undue "ontological lushness," one may begin by looking for whether it violates the principle of non-contradiction, for, surely illogic, if anything does, should count as unduly "lush." Smith's own two entries to a new and revised ontological inventory for law were: a) intention as the ground of "right answers" in law (i.e., a distillation of propositions 1) and

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114. SMITH, *supra* note 2, at 177.

115. *Id.*

116. *Id.* at 169.

117. *Id.* at 177.

118. "[V]irtue must have the quality of aiming at the intermediate." Aristotle, *Nicomachean Ethics* II, 6 in CLASSICS OF POLITICAL AND MODERN PHILOSOPHY 193 (Steven M. Cahn ed., 2002).

119. SMITH, *supra* note 2, at 152.

2) above); and b) a correlated concept or image of God as such intention's source.<sup>120</sup> Eligibility for admission to a revised ontological inventory for law, under Smith's proposed norm of the Aristotelean mean, depends on its not contradicting either statement. The question of the compatibility of St. Thomas's classical account with these two statements puts to the test whether Smith's theocentric jurisprudence offers a viable platform for a revival of the "classical" and "neoclassical" tradition associated with St. Thomas. It also helps to narrow the salient elements of the jurisprudence Smith actually proposes.

#### ST. THOMAS, AND SMITH'S IDEA OF DIVINE INTENTION AS THE GROUND OF "RIGHT ANSWERS" IN LAW

In alleging that "right answers" exist in law as a matter of the intention of an omniscient or virtually omniscient author (by inference, God), Smith is saying, in effect, that positive law *qua* positive law exists ontologically or metaphysically. St. Thomas asserts, by contrast, that positive law's ontological or metaphysical ground is contingent. In St. Thomas's view, positive law enjoys that ground only indirectly via a choice on the part of a community to advance its good through law. St. Thomas asserts that positive law remains, at all times, subject to evaluation for whether, under evolving circumstances, it comports with practical reason. Law loses practical reason's endorsement, and, with it, its ontological and metaphysical ground, the instant it ceases to be just. St. Thomas encapsulates this truth in the expression he borrows from St. Augustine: *Lex injusta non est lex* (an unjust law is no law).<sup>121</sup> For St. Thomas, neither the United States Constitution nor any unanimous holding of the United States Supreme Court is immune from this principle's force. In short, St. Thomas's jurisprudence falls within the mode of reasoning Smith identifies as the "'Law and' Strategy" and rejects. More specifically, notwithstanding Smith's curious silence in the matter, St. Thomas's jurisprudence fits within the sub-variety Smith terms "Law and (or as) practical reason."<sup>122</sup>

To be sure, St. Thomas maintains an interest in legal texts and in the validity and formal coherence of positive law. He devotes attention in particular to the divine positive law of the Bible that interests Philo of Alexandria and is an implicit point of reference, as well, in Smith's

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120. *But cf. supra* pp. 662-63.

121. *See* AQUINAS, *supra* note 91, at I-II Q. 96, art. 4. Aquinas says that unjust laws are "outrages rather than laws; Augustine remarks, There never seems to have been a law where justice was not present. Such commands do not oblige in the court of conscience." *Id.*

122. *See* SMITH, *supra* note 2, at 90-96.

position.<sup>123</sup> But, far from treating it as a foundation for a more general understanding of law, St. Thomas brackets divine positive law as a special instance without more general significance. He holds that the Bible adds nothing to what practical reason already discloses, other than by providing a salutary steadying influence in matters especially subtle and insight concerning matters too arcane to be otherwise reliably considered by human reason alone.<sup>124</sup>

When considered under the rubric of practical reason, as St. Thomas deems paradigmatic, law arises essentially wordlessly, through the common practice of established custom which suffices, without more, to create, abolish, and interpret law.<sup>125</sup> The formulation of law in a text or other positive statement of a rule is secondary. For St. Thomas, law subsists in, or through, a web of intangible moral relationships of mutual regard and respect (of shared law-abidingness) among persons coordinating their action in a pattern of common behavior conforming to reason's ordinances.<sup>126</sup> Lon Fuller's concept of law as an order of reciprocity begins to sketch St. Thomas's concept of law.<sup>127</sup> For St. Thomas, the bonds of law, mediate simultaneously two forms of basic human fulfillment, the possession of a just character and the enjoyment of civic friendship.<sup>128</sup> While St. Thomas's understanding of law ultimately

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123. See AQUINAS, *supra* note 91, at I-II Q. 91, art. 4 ("The guidance of human conduct required a divine law besides natural law and human law.").

124. See AQUINAS, *supra* note 91, at I-II Q. 91, art. 4.

The guidance of human conduct required a divine law besides natural law and human law . . . .

First, because law directs men to the actions matching what they are made for[,] . . . an eternal happiness out of proportion to their natural resources . . . .

Second, because of the untrustworthiness of human judgment . . . .

Third, . . . [because] they cannot pronounce on inward motions which are hidden . . . .

Fourth, . . . [because] human law cannot forbid or punish all wrongdoing, for were it to try to do away with all evils it would also take away much that was good, and so hinder what the common good requires in civilized intercourse . . . . Hence the need of a divine law which misses nothing and leaves no evil unforbidden or unpunished.

*Id.*

125. "[C]ustom has the force of law, abolishes a law, and is the interpreter of laws." *Id.* at I-II Q. 97, art. 3.

126. See AQUINAS, *supra* note 91, at I-II Q. 96, art. 3 ("[H]uman law does not enjoin every act of every virtue, but those acts only which serve the common good, either immediately, as when the social order is directly involved from the nature of things, or mediately, as when measures of good discipline are passed by the legislator to train citizens to maintain justice and peace in the community.").

127. See LON FULLER, *THE MORALITY OF LAW* 35 (1960).

128. See AQUINAS, *supra* note 91, at I-II Q. 92, art. 1 ("It is plain, therefore, that leading its subjects into the virtue appropriate to their condition is a proper function of law. Now since virtue is that which makes its possessor good, the consequence is that the

depends on a concept of God, this concept is unlike the intention behind the text seen in Smith. In St. Thomas, the goods of practical reason and human community the law serves, rather than the intention behind the legal text, mediate the law's divine ground. With respect to the debate between Smith and his symposium interlocutors, his interlocutors appear to have the stronger appeal to St. Thomas Aquinas.

#### ST. THOMAS, AND THE IDEA OF GOD WHICH SMITH'S TRANSCENDENTAL POSITIVISM IMPLIES

The metaphor unifying *Law's Quandary* compares a human lawmaker's intention in a particular case with the source of the intelligibility of the system of positive law overall. The image of the human lawmaker serves as trope, in the book's scheme, for God's transcendent conferral of intelligibility on all law and legal institutions. Lloyd Weinreb assigns centrality to analogy,<sup>129</sup> Steven Smith does not. Yet, the power of *Law's Quandary* actually lies in the many subtle lines of theological inquiry its pivotal metaphor seems to suggest when extended analogically. Expounding, as he does, his metaphor, Smith is, indeed, very generally, in the tradition of St. Thomas Aquinas with his metaphor of God as Eternal law. But, as differences in the ontology and metaphysics of law the two thinkers propose suggest, however, Smith departs from God's role as St. Thomas propounds it, upon descending to specifics.

Smith's notion of God as the source of the intention behind the text characterizes Protestantism and early modernity. The advent of printing ushered in the idea.<sup>130</sup> Early modern concepts of God, and for that matter of the human being, shifted, with the impact of printed texts and the debut of the authorial "I" of modernity that the postmodern mind, for its part, no longer takes for granted. Comparison of John Locke and St. Thomas illustrates the divergence of this newer view from a pre-modern

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proper effect of law on those to whom it is given is to make them good."); see also *id.* at I-II Q. 94, art. 2 ("There is in man . . . a tendency towards the good of the nature he has in common with all substances."); *id.* at I-II Q. 90, art. 2 ("[A]nd since a human individual man is part of the full life of the community, it must needs be that law properly speaking deals with this subordination to a common happiness.").

129. See Weinreb, *supra* note 15, at 717 ("Careful analogical reasoning, albeit not certain, is as reliable in law, as it is in the ordinary affairs of life.").

130. See generally ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE: COMMUNICATIONS AND CULTURAL TRANSFORMATIONS IN EARLY MODERN EUROPE* (Cambridge Univ. Press 1979). "[T]ypographical fixity" is an "important precondition for the Protestant Reformation taken as a whole." *Id.* at 171. "Fixity also made possible more explicit recognition of individual innovation and encouraged the staking of claims to inventions, discoveries, and creations." *Id.* at 93.



understanding of God and self.<sup>131</sup> St. Thomas recognizes God as the author of the Bible, and of divine positive law, but the anthropomorphism of a book-writing God is quite peripheral to his theology, and has no significant role in his jurisprudence. Smith's image of God is alien enough to St. Thomas's sacramental and analogical imagination.

The distinction between positive law and law, in the metaphysical or ontological sense, always fundamental for St. Thomas, is missing from *Law's Quandary*. In relating God to positive law, St. Thomas relies upon mediation by the "goods" of virtuous character and of genuine community, and of the "right" of justice under law. So mediated, God enters St. Thomas's jurisprudence always by reference to one of four distinct human realities, each a springboard for a distinctive understanding of God. In each instance, St. Thomas offers his concepts of God as true only by analogy, and so preserves God's transcendent mystery and safeguards the humility befitting human creatures contemplating the truth of God's existence.<sup>132</sup> St. Thomas holds that God's uncreated being is disproportionate to created human intellect, so that what human beings can know about God by inference is true only to the limited extent of an analogy of disproportion.<sup>133</sup> The created term of

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131. Compare JOHN LOCKE, SECOND TREATISE ON GOVERNMENT (Hackett Publ'g Co. 1980) (1690) with AQUINAS, *supra* note 91, at I-II Q. 1, art. 6; Q. 3, art. 8). Locke says "for men being all the workmanship of one omnipotent . . . maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are." LOCKE, *infra*. Aquinas says, "I answer that, Man must, of necessity, desire all, whatsoever he desires, for the last end," AQUINAS *supra* note 91, at I-II Q. 1, art. 6, and, that Man's "[f]inal and perfect happiness can consist in nothing else than the vision of the Divine Essence," *id.* at I-II Q. 3, art. 8.

132. See AQUINAS, *supra* note 91, at I Q. 13, art. 2. "Of names predicated of many in an analogical sense, all are predicated because they have reference to some one thing; and this one thing must be placed in the definition of them all. . . . a name must be applied primarily to that which is put in the definition of such other things, and secondarily to these others according as they approach more or less to that first. . . . [A]s regards the imposition of the names, they are primarily applied by us to creatures which we know first. Hence they have a mode of signification which belongs to creatures. . . . As regards absolute and affirmative names of God, as good, wise, and the like, . . . these names signify the divine substance, and are predicated substantially of God . . . so far as our intellects know Him. Now since our intellect knows God from creatures, it knows Him as far as creatures represent him. Now . . . God prepossesses in Himself all the perfections of creatures, being Himself simply and universally perfect. Hence every creature represents Him, and is like Him so far as it possesses some perfection." *Id.* So "hence as regards what the names signifies, these names are applied primarily to God rather than to creatures. . . . but . . . all names applied metaphorically to God, are applied to creatures primarily rather than to God, because when said of God they mean only similitudes to such creatures. . . ." See also AQUINAS, *supra* note 91, at I Q. 13, art. 7.

133. See AQUINAS, *supra* note 91, at I Q. 13, art. 5. "Whatever is predicated of various things under the same name but not in the same sense, is predicated equivocally. But no

this analogy remains always more unlike than like the divine term with which it is paired. St. Thomas approaches God on a *via negativa* only darkly knowing.<sup>134</sup>

Once this basic qualification has been established one is in a position to grasp the use St. Thomas makes in his jurisprudence, of four distinct divine images. Most fundamentally, St. Thomas relies on the assumption that the moral agent can, through introspection, infer God as the uncreated source of self-evident knowledge he or she possesses, that it is good to win civic friendship with others by observing a common rule of life.<sup>135</sup> This theological ground of law in St. Thomas is, then, remote from the heteronomy of the externalized text in Smith or Calvin. Second, St. Thomas presupposes that both the moral agent and the moral community infer God as a first cause of all the good that both individual and community have already realized, such that both are bound *in justice* to offer God praise and thanks.<sup>136</sup> This duty is one of religion. In St. Thomas religion cannot, then, be the source of a metaphysics of law, as in Smith, for religion becomes available, in St. Thomas, only subsequent to

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name belongs to God in the same sense that it belongs to creatures . . . . The reason of this is that every effect which is not an adequate result of the power of the efficient cause, receives the similitude of the agent not in its full degree, but in a measure that falls short . . . . Thus also this term *wise* applied to man is some degree circumscribes and comprehends the thing signified; whereas this is not the case when it is applied to God; but it leaves the thing signified as incomprehended, and as exceeding the signification of the name." *Id.*

134. See AQUINAS, *supra* note 91, at I Q. 12, art. 11 and 12.

A mere man cannot see the essence of God unless he be uplifted out of this mortal life. The reason for this is that, as we have said, the way in which a thing knows depends on the way it has its being. Our souls, so long as we are in this life, have their being in corporeal matter, hence they cannot by nature know anything except what has its form in matter or what can be known through such things. It is obvious, however, that the divine essence cannot be known through the natures of material things, for we have shown that any knowledge of God that we have through a created likeness is not a knowledge of his essence. Hence it is impossible for the human soul, as it is in this life, to see the essence of God.

*Id.* at I Q. 12, art. 11.

135. See *supra* note 128.

136. See AQUINAS, *supra* note 91, at I-II Q. 95, art. 3.

Whatever is for a purpose must needs be adapted to that purpose. . . . whatever is right and measured should be configured to what rules and measures it. Human law meets both requirements, for, first, it is something ordered to a purpose, and, second, is a sort of rule and measure itself ruled and measured by a higher.

*Id.* And for human law to be useful to men, the first condition is that it be "consistent with religion as corresponding with divine law." *Id.* Where gratitude is concerned, St. Thomas says that "[t]he nature of the debt to be paid must needs vary according to various causes giving rise to the debt, yet so that the greater always includes the lesser. Now the cause of debt is found primarily and chiefly in God, in that He is the first principle of all our goods. . . ." *Id.* at I-II Q. 106, art. 1. St. Thomas thus defines religion as a requirement of justice "whereby we pay God due worship. *Id.*

the activation of practical reason and the categories of law it generates which obligate the practice of religion as one duty, among other duties, in justice. Next, St. Thomas assumes that the moral agent and the moral community each encounter God as the Lord of history whose provident care sustains, inspires, and redeems free and creative human effort over time.<sup>137</sup> Finally, St. Thomas asserts that each moral agent finds an ultimate personal fulfillment in God, as his or her *summum bonum*. St. Thomas conceives of this final human fulfillment as occurring in the so-called "beatific vision."<sup>138</sup> For St. Thomas, each person brings an intimacy with God as basic personal concern to any discussion of the theological postulates of civil law.

When all is said and done, St. Thomas's theology of law is not, like Smith's, theocentric, but anthropocentric, since all four aspects of the Divine mentioned here derive their essential meaning in relation to some aspect of human fulfillment. When coupled with St. Thomas's caution that the human intellect knows nothing directly of God's nature, the anthropocentric quality of St. Thomas's theology leads fairly to the

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137. See AQUINAS, *supra* note 91, at I Q. 23, art. 1 ("We have seen that everything falls under his Providence . . . . So a creature of intelligence, capable of eternal life, is brought there, properly speaking, as sent by God."); *id.* at I Q. 22, art. 3 "There are two sides to providence, namely the idea or planned purpose for things provided, and its execution, which is called government"; *id.* at I-II Q. 93, art. 3 ("[T]he eternal law is the plan of government in the Chief Governor. . ."); *id.* at I-II Q. 93, art. 6 ("So therefore good men come completely under the Eternal Law as always acting in conformity to . . ."); *id.* at I-II Q. 112, art. 3 ("Thus if it is by the intention of God as mover that the men whose heart he moves should obtain grace, the man obtains it infallibly.").

138. If, therefore, we speak of man's last end as of the thing which is the end, thus all other things concur in man's last end, since God is the last end of man and of all other things. If, however, we speak of man's last end, as of the acquisition of the end, then irrational creatures do not concur with man in this end. For man and other rational creatures attain to their last end by knowing and loving God: this is not possible to other creatures, which acquire their last end, in so far as they share in the Divine likeness, inasmuch as they are, or live, or even know.

*Id.* at I-II Q. 2, art. 8.

Final and perfect happiness can consist in nothing else than the vision of the Divine Essence. First, that man is not perfectly happy, so long as something remains for him to desire and seek: secondly, that the perfection of any power is determined by the nature of its object. Now the object of the intellect is "what a thing is," i.e. the essence of a thing . . . Wherefore the intellect attains perfection, in so far as it knows the essence of a thing. Consequently, when man knows an effect, and knows that it has a cause, there naturally remains in the man the desire to know about the cause, "what it is." And this desire is one of wonder . . . . For instance, if a man, knowing the eclipse of the sun, consider that it must be due to some cause, and know not what that cause is, he wonders about it, and from wondering proceeds to inquire. Nor does this inquiry cease until he arrive at a knowledge of the essence of the cause.

*Id.* at I-II Q. 3, art. 8.

conclusion that knowledge of God, for St. Thomas, arises principally as an *interpretation* of the human being, that is, as created in *imago Dei*.<sup>139</sup>

A final contrast between St. Thomas and Steven Smith on the question of God can be drawn from divergent ways each sees God as a model for human action. Smith both sees God, as a source of the law's "semantic meaning" and law as a religiously meaningful vocation. As the ultimate source of legal texts, God, in this view, is, by analogy, a model for the lawyer, as consummate legal draftsman. St. Thomas, as Patrick Brennan develops, holds out an alternate concept of God as a model of one "provident for self and others."<sup>140</sup> In St. Thomas's scheme, this concept assists the human lawgiver who is available to engage in an ongoing thought experiment, wherein God figures, to steady practical reason, in the guise of a "hypothetical" infinitely benevolent, impartial observer.<sup>141</sup> Faith that God cares with perfect benevolence and justice for the universal happiness of all on the cosmic level aids the human lawgiver, amidst the inherent uncertainty of all human knowing, to strive to pursue the common good with—in Lloyd Weinreb's words—"reasonable certitude, based on conscientious effort," wherever possible, "to avoid bias, prejudice, indifference, self-interest, callousness toward others—all the all-too-human sources of error."<sup>142</sup>

Should Steven Smith opt to resolve the contradictions yet lodged within his current book, he will have to choose between continuity with the classical antecedent of St. Thomas Aquinas and the retention of his own theological postulates. Compatibility with St. Thomas would require Smith to yield his literalism to a more thoroughgoing schema of analogical reasoning or to some equivalent. The closest model for such an undertaking within the present discussion, curiously, is offered by Lloyd Weinreb, Smith's interlocutor with the least apparent interest in theology. Should Smith wish so to revamp his theory in this fashion, the work of John Finnis, perhaps the best known contemporary exponent of

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139. See AQUINAS, *supra* note 91, at I-II Q. 93, art. 1. "Now it is manifest that in man there is some likeness to God, copied from God as from an exemplar; yet this likeness is not one of equality, for such an exemplar infinitely excels its copy." *Id.* Karl Rahner asserted that all theology is anthropology. KARL RAHNER, *Theology and Anthropology*, in THEOLOGICAL INVESTIGATIONS IX 28-47 (G. Harrison trans., 1972). "As soon as man is understood as the being who is absolutely transcendent in respect of God, 'anthropocentricity' and 'theocentricity' in theology are not opposites but strictly one and the same thing, seen from two sides." *Id.* at 28.

140. Brennan, *supra* note 13, at 739 (citing AQUINAS, *supra* note 91, at I-II Q. 91, art. 2).

141. See AQUINAS, *supra* note 91, at I-II Q. 91, art. 1 ("[L]aw is nothing but a dictate of practical reason issued by a sovereign who governs a complete community. Granted that the world is ruled by divine Providence . . . it is evident that the whole community of the universe is governed by God's mind.").

142. Weinreb, *supra* note 15, at 729.

the "neoclassical model," serves as a reminder that contemporary natural law jurisprudence, like that the classical position of St. Thomas, remains anthropocentric, not theocentric. Finnis' metaphysically austere version of natural law makes mention of God indirect and, in a certain sense, optional.<sup>143</sup>

#### PATH INTO HAROLD BLOOM'S "ORPHIC AND GNOSTIC ABYSS"?

Should Smith forego rapprochement with St. Thomas, instead, to retain a theocentricism based on his own cornerstone entries for a revised ontological inventory of law, then he will have to address a separate contradiction within his current proposal: an apparent neo-Calvinism lacking either a concept of divine transcendence or human sinfulness. Smith ends the jurisprudence sketched in *Law's Quandary* by inviting the reader to consider the "lush" and "promiscuous" possibilities of a more complete ontological inventory of law. At this invitation, some readers formed in the traditions of doctrinal religion, may hear a disquieting echo or hint, not of Holmes's infinite or universal law, but of a sibilance threading its way just audibly through Smith's lush Edenic thicket. For insight into this disquiet, one need consult no authority so remote as John Calvin. Arthur Allen Leff, whose well known review of Roberto Unger's *Knowledge and Politics* was cited at the outset of this essay, will do. In the tradition of C.S. Lewis' *The Screwtape Letters*, Leff's review takes the form of a memorandum from "The Devil, etc." to "Roberto Mangabeira Unger, Professor of Law, etc."<sup>144</sup> Had Leff's devil had advance notice of Smith's project, one suspects that Leff might have been inspired to add, "cc: 'Steven Smith, Professor of Law, etc.'" The devil notes the complete absence in Unger, as do we in Smith, of an acknowledgement of the part of moral evil in the vagaries of human knowing and willing. The devil gives this unsolicited counsel to Unger: "Look around you at your species, throughout time and all over the world, and see what men seem to be like. Okay? Now take this hint from what you have seen: If He exists, Me too."<sup>145</sup>

Presumably not the hint or echo Holmes had in mind, the devil's retort should, nonetheless, be of interest to Steven Smith and those reading *Law's Quandary*. For further background, Smith and his readers might consider picking up psychiatrist Karl Menninger's book, *Whatever Became of Sin?*<sup>146</sup> This background reading would be of assistance, for one thing, in absorbing St. Thomas on the role of coercive force under

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143. See *supra* note 81.

144. Leff, *supra* note 10, at 879.

145. *Id.* at 889.

146. KARL A. MENNINGER, *WHATEVER BECAME OF SIN* (Hawthorn Books 1973).

law. Should Smith or any of his readers opt more unabashedly to pursue the theocentricism of Calvin that Smith, on a certain level, emulates, then one might, in addition, also recommend Calvin's *Institutes of the Christian Religion* on the depravity of human reason and will. Calvin declares that "all parts of the soul were possessed by sin after Adam deserted the fountain of righteousness. For not only did a lower appetite seduce him, but unspeakable impiety occupied the very citadel of his mind, and pride penetrated to the depths of his heart."<sup>147</sup> Calvin finds an antidote to this human depravity, and a source of a continuing commitment to the possibility of human dignity in the Sovereign Transcendence and Majesty of God who condescends to save human beings.<sup>148</sup> Twentieth-century Calvinist theologian, Karl Barth, thus, distinguishes faith in God from mere human religion bearing the disqualifying taint, as any other merely human endeavor, of original sin.<sup>149</sup> Smith's indiscriminating endorsement of religion brings home the nature of his departure from Barth and Calvin, and does not appear compatible with the idea of divine transcendence. Absent Calvin's notions of God's sovereignty, Smith's enthusiasm for religion courts banality.

Those whose professional identities are in law will recognize the hierarchical feeling of security and belonging this identity confers, when they hear it said at the alumni reception, "my niece is going into 'the Law,'" or, of a workaholic friend, "'the Law' is his jealous mistress," or, of someone who has finally settled down, "after a few years as a ski bum, she found a lucrative living in 'the Law.'" Law school admissions officers, those on law firm recruiting teams, and members of law school appointments committees everywhere will feel a familiar intoxicating surge at Smith's rallying cry, "*Law Exists!*" Smith's "law behind the law," his "divinely revealed fixed law," is at risk of morphing into the very "idol," against which he inveighs, when he notes that among "objects of veneration," "law surely appears near the top of the list" as a potential idol, because of its "power, its majesty, its imperial scope, its deep roots in tradition, and its well-honed ceremonialism all fit it for the role."<sup>150</sup>

Those, so inclined, might choose, therefore, to cast their fate with the Reform wing of Christianity in its ongoing work of formulating an adequate religiously-inspired ethic of law, by fortifying Smith's existing proposal with an infusion of awareness of divine transcendence and human sinfulness. There may be others, however, who might wish to move in a different direction, jettisoning this Christian tradition openly

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147. CALVIN'S INSTITUTES, *supra* note 96, at 252.

148. *See supra* note 98.

149. BARTH, EPISTLE, *supra* note 113, at 251-53.

150. SMITH, *supra* note 2, at 160.

to move Smith's proposal toward the quasi-gnostic "theocentrism" of Plato's *Laws*.<sup>151</sup> A drift of that kind is felt in the present book as an undercurrent, and appears to be no less essential to its complex character than its Calvinist coloration.<sup>152</sup> If one takes the path of an immanent or gnostic deity, one loses, by that choice, the traditional theological undergirding of the doctrines of Separation of Powers and First Amendment Separation of Church and State, as well as the historic foundation of a received American public philosophy at once secular and still respectful of human dignity. All of these inherited principles serve the cause of caution in the face of the human potential for the abuse of power. If one chooses to ratify Smith's immanentist quasi-pantheist drift, in contrast to his more traditional Calvinist themes, some observers may consider it time to ask where his mystagogy has so rapidly taken us.

In his volume, *The American Religion: The Emergence of the Post-Christian Nation*,<sup>153</sup> literary critic Harold Bloom offers a clue. Bloom proposes that characteristic national currents in American culture have long flowed from an "experiential faith, largely divorced from doctrine" that would have "left an emptiness in America but for something more vibrant that replaced doctrine, a timeless knowing that in itself saves."<sup>154</sup> Bloom traces the historic manifestations of this distinctively American unconscious religious mind through "American varieties of Orphism and gnosticism, of Enthusiasm and Antinomianism,"<sup>155</sup> observing that "[t]here are tens of millions of Americans whose obsessive idea of spiritual freedom violates the normative basis of historical christianity, though they are incapable of realizing how little they share of what once was considered christian doctrine."<sup>156</sup>

The American mentality Bloom describes knows nothing of the doctrinal underpinnings of a consistent regard for God's transcendence

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151. Patrick Brennan observes of Smith that a "Platonic shadow slips back in." Brennan, *supra* note 13, at 746. Plato teaches that "Now God ought to be to us the measure of all things, and not man." PLATO, *LAWS* 90 (Benjamin Jowett trans., Prometheus Books 2000). Without any clear demarcation of the difference between created and uncreated being, as in St. Thomas, Plato declares that "God invented and gave us sight to the end that . . . we, learning . . . and partaking of the natural truth of reason, might imitate the *absolutely unerring courses of God* and regulate our own vagaries." PLATO, *TIMAEUS* in PLATO, *COLLECTED DIALOGUES* 1175 (Edith Hamilton & Huntington Cairns, eds., 1961) (emphasis added).

152. Smith intimates a "sort of pantheism" wherein through law of all things "we come to know a universal mind" which turns out to be "the same thing" as our "own true selves." SMITH, *supra* note 2, at 173.

153. HAROLD BLOOM, *THE AMERICAN RELIGION: THE EMERGENCE OF THE POST-CHRISTIAN NATION* (1992).

154. *Id.* at 49.

155. *Id.* at 30.

156. *Id.* at 263.

or the doctrine of original sin, essential linchpins of the theocentricism of the Protestant precursors of the American experiment in law. In a parallel vein, Steven Smith's "theocentrism" lacks the doctrinal underpinnings of the Wesleyan John Newton's hymn, *Amazing Grace*.<sup>157</sup> As one listens for the deeper chords in Smith's theocentrism, one is perhaps aware of inklings of the American religious self Bloom intimates, one which is "persuaded that it also preceded the created world" and "[a]n abyss within the self finds itself at peace when it is alone with an abyss that preceded the world God made."<sup>158</sup> If such is in fact the case, "the echo of the infinite, a hint of universal law" we hear through Smith's mystagogy, if allowed to flower fully and freely, might well point to the distinctive "orphanic and gnostic abysses of the national self"<sup>159</sup> that Bloom describes as characteristically American and which now, more than ever, threads its way through American civic religion.<sup>160</sup> Should Steven Smith or those he inspires choose to continue in this direction, his mystagogy will have been found to lead not so much to the "philosophical confusion" Justice Scalia eschews as to a gnostic and orphanic jurisprudence just possibly expressing a distinctively American form of religious consciousness.

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157. This hymn, written by John Newton (1725-1807), was first included in a Wesleyan hymnal in 1779. *Amazing Grace! How Sweet the Sound*, COMPANION TO THE HYMNAL, A HANDBOOK TO THE 1964 METHODIST HYMNAL 88-9 (1970).

158. BLOOM, *supra* note 153, at 31.

159. *Id.* at 16.

160. Bloom describes this pattern in terms of "the outline of a religion not yet fully evident among us but stretching like a long shadow beyond us." He predicts that it will adopt a bellicose stance on the global stage. *Id.* at 35.



